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Nos. 99-1462, 99-1739 and 99-1745

In the Supreme Court of the United States

CITY OF FORT WORTH, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

AMERICAN AIRLINES, INC., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the City of Dallas is precluded by the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), or by two subsequent Acts of Congress, the Wright and Shelby Amendments, from restricting routes and services operated by airlines from its Love Field airport.

2. Whether agreements between the Dallas-Fort Worth International Airport Board and various airlines, which provide that the airlines will not use competing airports such as Love Field without the Board's permission, are preempted by federal law.

3. Whether the Department of Transportation was bound by a state court judgment, recently reversed on appeal, in a suit brought by the City of Fort Worth against the City of Dallas, to which the United States was not a party and in which the state court interpreted federal statutes governing Love Field service.

4. Whether the Department of Transportation correctly construed the Wright and Shelby Amendments as permitting "through service" from Love Field when the initial portion of the trip is to another location within Texas and is made on an aircraft with a capacity of no more than 56 passengers.

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In the Supreme Court of the United States

No. 99-1462

CITY OF FORT WORTH, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 202 F.3d 788. The orders of the Department of Transportation (Pet. App. 53-177) are unreported.[1]

[1] "Pet. App." refers to the appendix to Fort Worth's petition for a writ of certiorari (No. 99-1462). "FW Pet.," "AA Pet.," and "DFW Pet."

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-52) was entered on February 1, 2000. The petition for a writ of certiorari in No. 99-1462 was filed on March 3, 2000. The petitions for a writ of certiorari in No. 99-1739 and No. 99-1745 were filed on May 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the domestic airline industry. The Act, after a phase-in period, allowed each airline to operate from any commercial airport and to serve any domestic route without prior regulatory approval. To ensure that state and local governments would not replace federal regulation with regulation of their own, Congress included a preemption provision, which barred state and local governments from enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b); see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992). That provision, however, "does not limit" a state or local government that "owns or operates an airport" from "carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3).[2]

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refer to the petitions for a writ of certiorari filed by Fort Worth, American Airlines, and the Dallas-Fort Worth International Airport Board, respectively.

[2] Section 41713(b) provides, in pertinent part:

> Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Two subsequent Acts of Congress specifically govern airline service at Love Field airport in Dallas. The Wright Amendment, enacted in 1980, restricts interstate service at Love Field, but expressly authorizes certain service. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 48-49.[3] The Shelby Amendment,

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* * * * *

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

[3] The Wright Amendment (§ 29, 94 Stat. 48) provides, in pertinent part:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

* * * * *

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from,

enacted in 1997, expanded the scope of interstate service authorized at Love Field. Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1447.[4]

The Department of Transportation is responsible for administering the preemption provisions of 49 U.S.C. 41713. See 49 U.S.C. 40113(a) (Secretary of Transportation may take whatever action he "considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders"); 49 U.S.C. 46101(a)(2); see also *American Airlines* v. *Wolens*, 513 U.S. 219, 229 n.6, 234 (1995) (Department of Transportation is the "superintending agency" and "experienced administrator" of the preemption provision). The Depart-

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and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

[4] The Shelby Amendment (§ 337, 111 Stat. 1447) provides, in pertinent part:

(a) IN GENERAL.—For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION.—The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 *et seq.*) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

* * * * *

ment is also responsible for administering and enforcing the Wright and Shelby Amendments. *Kansas* v. *United States*, 16 F.3d 436, 438 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994); *Cramer* v. *Skinner*, 931 F.2d 1020, 1024 (5th Cir.), cert. denied, 502 U.S. 907 (1991); *Continental Air Lines* v. *Department of Transp.*, 843 F.2d 1444, 1448 (D.C. Cir. 1988).

In this case, the Department of Transportation, after soliciting and reviewing comments, issued a ruling interpreting those statutes. The Department concluded that Dallas may not restrict the routes and services that airlines provide from Love Field, either directly or by contract between the Dallas-Fort Worth International Airport Board (the DFW Airport Board) and an individual airline. Pet. App. 93-127, 133-141.[5]

1. For many years, the twin cities of Dallas and Fort Worth each operated their own airports, which competed to be the area's principal airport. Love Field was the local airport for Dallas. The cities resolved the dispute by agreeing to build Dallas-Fort Worth International Airport (DFW Airport). See *Cramer*, 931 F.2d at 1023. The cities' agreement, set forth in their 1968 Regional Airport Concurrent Bond Ordinance (1968 Bond Ordinance), required the cities to phase out virtually all interstate scheduled service at their local airports to the extent "legally permissible." Pet. App. 2-3, 58-61.

After DFW Airport opened, Dallas continued to operate Love Field. The interstate airlines moved to DFW Airport, but Southwest Airlines, then a new airline that provided service only within Texas, refused to move. After extensive litigation, Southwest Airlines won a judgment entitling it to

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[5] The DFW Airport Board is a local governmental body created and authorized under state law to be the owner and operator of Dallas-Fort Worth International Airport. Dallas appoints seven of the members of the 11-member Board. Pet. App. 58.

continue using Love Field for flights within Texas. See *Cramer*, 731 F.2d at 1023; Pet. App. 3.

Although Southwest Airlines initially operated only intrastate routes, after the enactment of the Airline Deregulation Act, the Civil Aeronautics Board ruled, over the objection of Dallas and Fort Worth, that Southwest Airlines could operate a Love Field-New Orleans route. *Cramer*, 731 F.2d at 1023. In response to that decision, Congress enacted the Wright Amendment, which was designed as a compromise between the two cities and Southwest Airlines. See H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979); Pet. App. 3-4, 64, 123.

The Wright Amendment restricts interstate scheduled passenger service from Love Field. Subsection (a) permits interstate flights from Love Field by aircraft having a capacity of no more than 56 passengers. Subsection (c) permits flights from Love Field to the four States bordering Texas—Louisiana, Arkansas, Oklahoma, and New Mexico—on aircraft of any size, but prohibits interline or through service. Pet. App. 3-5 n.1.[6] Dallas and Fort Worth did not attempt to block Southwest Airlines from adding interstate routes in accordance with the Wright Amendment. Nor did the cities amend the 1968 Bond Ordinance to reflect the Wright Amendment. *Id.* at 64-67.

In 1997, Congress enacted the Shelby Amendment, which expands the interstate service authorized at Love Field. The Shelby Amendment clarifies subsection (a) of the Wright Amendment as including large aircraft of up to 300,000 pounds gross aircraft weight if they are configured

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[6] Interline service is connecting service involving a change from one airline to another that is provided under agreements whereby each carrier agrees to accept tickets written for travel on it by the other carrier; the carriers provide for transfer of baggage between the flights. Through service is service provided between the origin and destination on a single ticket.

or reconfigured to have no more than 56 seats. The Shelby Amendment expands subsection (c) to add three more States —Mississippi, Alabama, and Kansas—to those to which service from Love Field is permissible on an aircraft of any size. Pet. App. 5-7 & n.2, 71-72.

2. After the enactment of the Shelby Amendment, Fort Worth sued Dallas in Texas state court, contending that Dallas was constrained by the 1968 Bond Ordinance from allowing the expanded service at Love Field authorized by the Shelby Amendment. *City of Fort Worth* v. *City of Dallas*, No. 48-171109-97 (Tarrant County Tex. Dist. Ct., filed Oct. 10, 1997). Fort Worth was supported by the DFW Airport Board and American Airlines, which has a major hub at DFW Airport. The Department of Transportation was not a party to that action. Pet. App. 148-149, 158-159.

In December 1998, the state court issued a judgment holding that Dallas was obligated by the 1968 Bond Ordinance to prohibit airlines from using Love Field to serve points outside Texas and the four States identified in the Wright Amendment. The court further held that federal law did not bar Dallas from regulating flights in that manner. Pet. App. 178-181.

Dallas, together with various airlines that planned to use Love Field, appealed. The state court of appeals stayed proceedings pending the Fifth Circuit's decision in this case. Pet. App. 7. After the Fifth Circuit issued its decision, the state court of appeals issued its own decision, which reversed the state trial court. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).

Meanwhile, Dallas sued Forth Worth and the Department of Transportation in federal court, seeking a declaratory judgment that Dallas may not bar airlines from operating interstate service at Love Field. *City of Dallas* v. *Department of Transp.*, No. 3-97CV-2734-T (N.D. Tex., filed Nov. 6,

1997). That action was stayed pending the resolution of this case. Pet. App. 7, 75-76.

3. While the state and federal court actions were pending, the Department of Transportation commenced a proceeding to interpret the federal statutes governing Love Field. Order No. 98-8-29 (Aug. 25, 1998). One week after the state trial court issued its judgment in *City of Fort Worth*, the Department issued its final orders on the statutory interpretation issues and various jurisdictional and procedural issues. Order Nos. 98-12-27 and 98-12-28 (Dec. 22, 1998) (Pet. App. 53-177).[7]

a. As a threshold matter, the Department determined that it has the authority to issue an order interpreting the relevant federal statutes, which it is responsible for administering and enforcing. Pet. App. 154-158 (citing, *inter alia*, *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366-367 (1994), and *Wolens*, 513 U.S. at 229 n.6, 234). The Department further noted that the dispute in this case "raises substantial federal issues that this Department should address." *Id.* at 155.

The Department of Transportation concluded that the pending state and federal court proceedings did not preclude it from issuing its interpretation of the federal statutes. The Department explained that, "[g]iven its responsibilities for administering those statutes, the Department should assist the parties by issuing its interpretation." The Department also observed that it was not a party to the state court action, and thus would not be bound by the ensuing state court judgment. Pet. App. 158-159.

b. On the merits, the Department of Transportation concluded that Dallas cannot impose the restrictions on interstate service from Love Field sought by Fort Worth (*e.g.*, a

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[7] The Department of Transportation subsequently reaffirmed the orders on reconsideration. Order Nos. 99-4-13 and 99-4-14 (Apr. 13, 1999).

prohibition on flights from Love Field to States other than the four identified in the Wright Amendment). The Department explained that those restrictions "are equivalent to route regulation." Pet. App. 103. As such, the restrictions are preempted by 49 U.S.C. 41713(b), which prevents state and local governments from enforcing laws "related to a price, route, or service of an air carrier," unless saved by its exception for actions of an owner or operator of an airport to "carry[] out its proprietary powers and rights."

The Department of Transportation noted that the courts have held that States and cities, as airport proprietors, may restrict airline service when "necessary to carry out a legitimate airport goal," such as to alleviate ground congestion, noise, or other environmental problems. Pet. App. 100. But the Department added that "[n]o court has held or suggested that one airport may adopt a perimeter rule [*i.e.*, a rule restricting the distance of flights to and from that airport] to protect a different airport from competition." *Ibid.*

Here, the Department of Transportation determined that the record did not establish that any "legitimate airport goal" would be advanced by the service restrictions sought by Fort Worth. The Department observed that the parties had not presented any evidence showing, for example, that the additional Love Field service authorized by the Shelby Amendment "would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport." Pet. App. 111. Indeed, the Department observed, the Wright and Shelby Amendments continue to impose substantial restrictions on long-haul Love Field services by barring the use of aircraft with more than 56 seats on flights outside Texas and a seven-state area. *Id.* at 112. The Department noted that the flights operated from Love Field, even after the Shelby Amendment, "will be a

small fraction" of the flights operated from DFW Airport. *Ibid.*[8]

In addition, the Department of Transportation concluded that, even aside from the express preemption provision of 49 U.S.C. 41713(b), the Wright and Shelby Amendments impliedly preempt the cities' regulation of service at Love Field. Pet. App. 120-127. The Department reasoned that "Congress has occupied the field" with respect to interstate service at Love Field and that "allowing the cities to restrict service would frustrate Congress' policies." *Id.* at 121.

c. The Department of Transportation concluded that the "use agreements" that the DFW Airport Board entered into with individual airlines are preempted by 49 U.S.C. 41713(b), to the extent that the agreements prevent the airlines from operating interstate flights at Love Field (or other airports in the Dallas-Fort Worth area) without the DFW Airport Board's consent. Pet. App. 133-141.[9] The Department explained that the DFW Airport Board cannot regulate airline routes by contract any more than Dallas and Fort Worth can regulate routes by ordinance. *Id.* at 135. The Department observed that the consent provisions in the use agreements "frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of

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[8] The Department of Transportation also found that Dallas was not a "proprietor" of DFW Airport, and therefore could not justify route restrictions at Love Field on the basis of its needs as the owner or operator of DFW Airport. The Department explained that, although Dallas chooses seven of the 11 members of the DFW Airport Board, Dallas does not control that Board, as reflected in the conflicting positions of Dallas and the Board in this proceeding and in the state court proceeding. The Department also noted that eight members of the DFW Airport Board must approve any decision granting an airline a waiver to use an airport other than DFW Airport for interstate service. Pet. App. 118-120.

[9] Although airlines may use DFW Airport without signing a use agreement, airlines signing a use agreement pay lower fees for the use of that facility. Pet. App. 139.

additional competition and additional service options." *Id.* at 139.

d. The Department of Transportation concluded that airlines may offer through service and ticketing from Love Field to points outside the seven-state service area established by the Wright and Shelby Amendments, if the through service involves (i) an initial flight on an aircraft with a capacity of 56 passengers or fewer from Love Field to another airport in Texas followed by (ii) a flight from that Texas airport to an ultimate destination outside the seven-state service area. Pet. App. 141-145. The Department explained that subsection (a) of the Wright Amendment contains no restriction on through service by aircraft with 56 seats or fewer; only larger aircraft are prevented, by operation of subsection (c), from offering through service and ticketing. The Department also noted that the Wright Amendment imposes no restrictions on intrastate service (*e.g.*, the initial leg of the contemplated travel). *Id.* at 142-143.

The Department of Transportation reasoned that a contrary approach would create a distinction that could not have been intended by Congress. The Department noted that the Wright and Shelby Amendments do not prohibit through service, the initial leg of which is a flight, on an aircraft with a capacity of 56 passengers or fewer, that begins at Love Field and ends in another State. The Department concluded that Congress did not intend a different result where the first leg of the through service was a flight that ended in Texas rather than another State. Pet. App. 145.

4. The court of appeals affirmed the Department of Transportation's orders. Pet. App. 1-52.

a. The court of appeals held that 28 U.S.C. 1738, the "full faith and credit" statute,[10] did not require the Department of Transportation to give preclusive effect to the judgment of the state trial court in *City of Fort Worth*. The court reasoned that Section 1738, by its terms, applies only to "court[s]," not to federal agencies. Pet. App. 17-19.

The court of appeals also held that the Department of Transportation was not required to give preclusive effect to the state trial court judgment as a matter of federal common law. Pet. App. 19-23. In resolving that question, the court weighed "the policies favoring full faith and credit, including repose and federalism concerns," against "the federal interests present here." *Id.* at 19-20. First, the court reasoned that the interests in repose were not strongly implicated, because the Department's proceedings were already well underway when the state court issued its judgment. *Id.* at 21. Second, the court reasoned that the national interests in this case are particularly strong, both because the case involves airline operations, a subject principally regulated by the federal government, and because Congress has twice specifically addressed aviation regulation with respect to Love Field. *Ibid.* Third, the court reasoned that requiring the Department to give preclusive effect to the state court judgment would produce "inconsistent results," because some of the parties before the Department were not parties to the state court proceedings. *Id.* at 22.

b. The court of appeals held that the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), bars Dallas from restricting interstate service at

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[10] Section 1738 provides, in relevant part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Love Field, as Fort Worth contended was required under the 1968 Bond Ordinance. Pet. App. 32-39.[11] The court noted that the parties did not seriously dispute that the restrictions "relat[e] to * * * routes" within the scope of Section 41713(b). *Id.* at 33. The parties disputed only whether the restrictions are within the "proprietary powers" exception to Section 41713(b) for actions of an airport owner carrying out its "proprietary powers and rights." *Ibid.* The court agreed with the Department of Transportation that the exception is inapplicable here. *Id.* at 37-39.

The court of appeals, consistent with other courts that have addressed similar issues, recognized that airport proprietors play an "extremely limited role in the regulation of aviation." Pet. App. 33-34 (internal quotation marks omitted) The court noted that airport proprietors have thus been permitted to adopt perimeter rules and similar route restrictions only to "alleviate an existing problem at the airport or in the surrounding neighborhood," such as airport congestion, noise, or other environmental concerns. *Id.* at 35. The court found that petitioners had failed to justify the restrictions on Love Field service as serving any comparable local objective. *Id.* at 37-38. The court concluded that the reallocation of flights between airports, "in and of itself," is not a sufficient objective to satisfy the proprietary powers exception. *Id.* at 38.[12]

c. The court of appeals also held that the use agreements between the DFW Airport Board and individual airlines are

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[11] The court of appeals found it unnecessary to decide whether the Department's preemption ruling is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court determined that the Department's ruling is correct even under a de novo standard of review. Pet. App. 31-32.

[12] The court of appeals declined to address the alternative grounds for preemption found by the Department of Transportation. Pet. App. 38-39 nn.16, 17.

preempted, to the extent that those agreements prevent an airline from providing interstate service at airports such as Love Field without the Board's consent. Pet. App. 43-47.[13] The court noted that government contracts are subject to preemption if they are an attempt by a state or local government to regulate. *Id.* at 44 (citing, *inter alia*, *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 226 (1993)). The count found that the use agreements, which were designed to implement the 1968 Bond Ordinance and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance," are an attempt to regulate airline service. *Id.* at 45. In view of the "overlap" between the use agreements and the 1968 Bond Ordinance, which the court had already held to be preempted, the court concluded that the use agreements are likewise "an impermissible attempt to regulate in an area where the federal government has preempted state regulation." *Ibid.*

d. Finally, the court of appeals affirmed the Department of Transportation's determination that an airline may, consistent with the Wright and Shelby Amendments, offer through service from Love Field to points outside the seven-state service area if the airline uses a Texas city as a connecting point and an aircraft with 56 seats or fewer to fly to the Texas connecting point. Pet. App. 47-52. The court held that the language of the Wright and Shelby Amendments is not dispositive, but that the Department's construction is permissible under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 50. The court explained that the Department could reasonably

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[13] Again, the court of appeals did not decide whether the Department of Transportation's ruling on this issue is entitled to deference under *Chevron*, because the court concluded that the ruling is correct under a de novo standard of review.

conclude that, because the Wright Amendment imposed an express prohibition on through service on large aircraft operating under subsection (c) but not on small aircraft (*i.e.*, those with a capacity of no more than 56 passengers) operating under subsection (a), Congress intended to permit small aircraft to operate free of such a prohibition. *Ibid.* The court also observed that the Department's construction of the Wright and Shelby Amendments as permitting through service where the initial flight is on an aircraft with no more than 56 seats is "not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some long haul service." *Id.* at 51.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any state supreme court. This Court's review is therefore not warranted.

1. Petitioners Fort Worth (Pet. 13-19) and American Airlines (Pet. 11-27) challenge the court of appeals' ruling that 49 U.S.C. 41713(b), the express preemption provision of the Airline Deregulation Act, prevents the enforcement of the 1968 Bond Ordinance whereby Fort Worth and Dallas undertook to phase out interstate flights at their municipal airports. Section 41713(b) bars a city from enacting or enforcing any law "related to a price, route, or service of an air carrier," unless the city is acting, in its capacity as the owner or operator of an airport, to "carry[] out its proprietary powers and rights." 49 U.S.C. 41713(b)(1) and (3). Petitioners do not dispute that the 1968 Bond Ordinance is "a law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). But petitioners contend that the 1968 Bond Ordinance comes within the statutory exception as an exercise of the cities' "proprietary powers and rights."

a. The court of appeals and the Department of Transportation correctly concluded that Dallas would not be exercising "proprietary powers and rights," 49 U.S.C. 417123(b)(3), in restricting service at Love Field, at least absent a stronger justification for doing so than was offered by petitioners here.[14]

As the court of appeals recognized (Pet. App. 33-34), Congress has reserved an "extremely limited role * * * for airport proprietors in our system of aviation management." *British Airways Bd.* v. *Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977); see *City & County of San Francisco* v. *FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991) (observing that "[t]he federal government regulates aircraft and airspace pervasively," although reserving "a limited role for local airport proprietors" in certain areas), cert. denied, 503 U.S. 983 (1992). Any restriction on airline service that a state or local government, in its capacity as airport proprietor, imposes under Section 41713(b)(3) must be reasonable, non-arbitrary, and non-discriminatory. *National Helicopter Corp.* v. *City of N.Y.*, 137 F.3d 81, 89 (2d Cir. 1998) (citing *British Airways*, 564 F.2d at 1005). The few federal cases that have allowed an airport proprietor to allocate service between two airports primarily relied on the proprietor's need to relieve ground congestion, noise, or other environmental concerns. *Id.* at 88-89.[15]

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[14] The Department of Transportation also concluded that the proprietary powers exception of Section 41713(b)(3) is inapplicable, in any event, because Dallas is not the proprietor of DFW Airport, and thus cannot limit service at Love Field in aid of a propriety interest in DFW Airport. See Pet. App. 118-120; see p. 10 note 8, *supra*. The court of appeals found it unnecessary to reach that alternative ground for decision. Pet. App. 38-39 n.16.

[15] American Airlines cites statements made during the congressional debate on the Airline Deregulation Act that an airport proprietor could determine the "level and nature of service to be provided at airports." See

Petitioners did not advance any of those justifications for restricting airline service at Love Field. Nor did petitioners offer any other reasonable justification. Petitioners merely assert (FW Pet. 13) that DFW Airport might suffer some economic harm if additional flights are allowed from Love Field. But the Department of Transportation found that additional Love Field service would not undermine DFW Airport's position as the area's principal airport. See Pet. App. 56 (noting that "[n]o one has tried to show in this proceeding" that additional Love Field service would have such an effect). The Department's finding is clearly reasonable, especially given the Wright and Shelby Amendments, which continue to impose significant restrictions on Love Field service. As the Department noted, even if the currently proposed expansions in service occur, they would amount to a total of 360 daily flights at Love Field, "a small fraction of the 2,800 flights operated each day at DFW." *Id.* at 112-113.[16]

At bottom, petitioners are arguing that Dallas should be permitted to restrict business for Love Field simply to preserve business for DFW Airport—that is, to limit competition between the two airports in order to favor the airport

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124 Cong. Rec. 37,419-37,420, 38,526 (1978). The cited statements were made in response to specific inquiries about whether airports could continue to regulate service in order to deal with noise and other environmental problems. The statements thus do not support petitioners' claim of broad authority to limit routes and services.

[16] American Airlines also suggests (Pet. 20, 25-26) that the perceived need to limit flights from Love Field 30 years ago, when DFW Airport was established, is sufficient to justify protecting a thriving DFW Airport from competition today. But nothing in the text of Section 41713(b) suggests that a regulation, if once justified as a permissible exercise of an airport owner's proprietary rights, remains justified notwithstanding changed conditions. The Department of Transportation reasonably concluded that the relevant inquiry is whether a restriction is currently needed. See, *e.g.*, Pet. App. 111-113.

that petitioners prefer. The Department of Transportation properly concluded that such discriminatory restrictions "would be contrary to the very essence of deregulation, which is intended to promote competition." Pet. App. 106. This Court has observed that States and their political subdivisions may not, in light of the Airline Deregulation Act, impose "their own public policies or theories of competition or regulation on the operations of an air carrier." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995); see *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989) (in affirming the Department of Transportation's decision invalidating the fee structure imposed by an airport owner to discourage small aircraft from using its primary airport, the court observed that the proprietary rights exception is "not unlimited and is subject to curbing if it transgresses into the general field reserved for federal interest").

Petitioner American Airlines broadly predicts (Pet. 4-5, 11-12, 15, 18-27), without citing any factual or legal support, that the court of appeals' decision will introduce uncertainty into airport management, impede airports' ability to raise revenues in financial markets, and interfere with regional planning. But there is no reason to assume, based on American Airlines' assertions alone, that those predictions will prove accurate. To the contrary, the court of appeals did not purport to announce any new rule of law in this case; instead, the court simply affirmed the well-established rule that airports may not regulate airline routes and services, unless they demonstrate that such regulation is reasonable and necessary to protect their proprietary interests. The court did not suggest that, if a local airport authority could demonstrate that restrictions on service at one of its airports were necessary in order to preserve the economic viability of another of its airports, such restrictions would be impermissible.

b. Petitioners Fort Worth (Pet. 13-16) and American Airlines (Pet. 11-14) contend that the court of appeals' decision on the preemption issue conflicts with *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *Arapahoe County Public Airport Authority* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Petitioners are mistaken with respect to both decisions.

In *Western Air Lines*, the Second Circuit identified a specific problem—airport "congestion"—as a permissible reason for the Port Authority, as the proprietor of the three airports in the New York metropolitan area, to restrict long-haul flights to and from LaGuardia Airport. See 817 F.2d at 223. The Second Circuit thus did not, as petitioners suggest, recognize any general authority of local governments to allocate air traffic among airports that they own. Moreover, in its subsequent *National Helicopter* decision, the Second Circuit stated that the proprietary rights exception allows municipalities to regulate "only a narrowly defined subject matter—aircraft noise and other environmental concerns at the local level." 137 F.3d at 89. Significantly, *National Helicopter*, in disapproving local regulation of flight paths, stated that the proprietary rights exemption gives "no authority to local officials to assign or restrict routes." *Id.* at 92. There is no conflict between the Second Circuit and the Fifth Circuit on any issue presented in this case.[17]

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[17] Fort Worth also relies (Pet. 15-16) on *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), for the proposition that an airport proprietor may allocate long-haul and short-haul flights among its airports. In *City of Houston*, however, the federal government, not a state or local government, was the owner of the airports, Washington National Airport and Dulles International Airport. See *id.* at 1186. As the Fifth Circuit explained in this case (Pet. App. 35 n.14), the restrictions of Section 41713(b) do not apply to the federal government. Moreover, the court upheld the perimeter rule in *City of Houston* because it was a reasonable

In *Arapahoe*, an airport authority prohibited scheduled airline service at an airport where such service had never been offered. 956 P.2d at 590-591. The Colorado Supreme Court determined that the prohibition did not relate to airline services, fares, or routes, within the meaning of Section 41713(b), and thus was not subject to preemption. *Id.* at 594-595. Although the court went on to conclude that the prohibition came within the proprietary rights exception, *id.* at 595, that conclusion was not essential to the court's holding that the prohibition was not preempted. Here, in contrast, the Fifth Circuit was concerned with a restriction that indisputably *does* relate to services and routes. See Pet. App. 33 (court of appeals notes that there was "no significant argument" in this case that the 1968 Bond Ordinance related to airline services and routes). The Colorado Supreme Court expressly distinguished regulations that prohibit all scheduled passenger service at an airport, as in *Arapahoe*, from regulations that allocate long-haul and short-haul scheduled passenger service between or among multiple airports, as in *Western Air Lines* and this cases. See 956 P.2d at 595; see also *id.* at 596 n.12 (distinguishing the circumstances involv-

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means of reducing congestion at Washington National Airport and dealing with severe under-utilization of Dulles International Airport, which threatened its economic viability. 679 F.2d at 1191-1192. These proprietary objectives, however, have no application to this case. And, even if some tension existed between the decision below and *City of Houston*, this Court does not grant review to resolve intracircuit conflicts.

Fort Worth also identifies (Pet. 16-17) instances in which the Department of Transportation has considered the closing of local airports in favor of new regional airports. But the Department was acting in those instances in furtherance of its own responsibilities to administer federal aviation laws and airport programs. The decisions whether to close the local airports were not to be made by a local government unilaterally. Here, in contrast, the Department has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport.

ing the Centennial Airport in *Arapahoe*, "where scheduled passenger service has never been permitted," from those involving Love Field, where the proprietor sought to cut back on scheduled passenger service that had previously been offered). Accordingly, because the present case and *Arapahoe* differ so significantly in their facts and circumstances, they do not present any square conflict.[18]

c. In any event, even if petitioners' efforts to enforce restrictions on service at Love Field were not expressly preempted by Section 41713(b), they are impliedly preempted by the Wright and Shelby Amendments. The court of appeals found it unnecessary to reach that independent ground for preemption. Pet. App. 39 n.17. The Department of Transportation, however, concluded that the restrictions on Love Field service are preempted both expressly and impliedly. *Id.* at 120-127.

This Court has found implied conflict preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Geier* v. *American Honda Motor Co.*, No. 98-1811, slip op. 10 (May 22, 2000). That standard is satisfied here.

The Wright and Shelby Amendments prescribe, with specificity, the interstate service that airlines may provide at Love Field. Congress obviously did not intend in those amendments simply to give Dallas, as the proprietor of Love Field, the option to permit such service, if the city chose to

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[18] The dispute in *Arapahoe* is far from resolved. The Federal Aviation Administration recently determined that the airport owner could not ban scheduled service at the airport where the owner allowed comparable non-scheduled service. *Centennial Express Airlines* v. *Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1 (Feb. 28, 1999). That decision is now on appeal to the Tenth Circuit. *Arapahoe County Pub. Airport Auth.* v. *FAA*, No. 99-9508.

do so. Rather, Congress sought to resolve the matter definitively. The Wright Amendment was thus described in the Conference Report as "provid[ing] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"—a "settlement" that "ha[d] been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Forth Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The Shelby Amendment authorized additional service at Love Field. Congress ultimately excluded from the Shelby Amendment a proposed provision that would have given Dallas a veto over some aspects of that expanded service. See Pet. App. 126-127 (discussing provision). Congress's objective in the Wright and Shelby Amendments to allow specified interstate service from Love Field, if airlines choose to offer it, would be frustrated by local laws, such as the 1968 Bond Ordinance, that purport to disallow such service. Accordingly, as the Department of Transportation concluded, the Wright and Shelby Amendments impliedly preempt local laws restricting service at Love Field.[19]

2. Petitioners Forth Worth (Pet. 19-21) and DFW Airport Board (Pet. 12-20) challenge the court of appeals' holding that Section 41713(b) preempts the enforcement of the provisions of the Board's use agreements with individual airlines that prevent the airlines from using Love Field without the Board's consent.

As the court of appeals recognized (Pet. App. 43-47), the use agreements constitute regulation, by a local government

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[19] The Department of Transportation also concluded that local laws restricting service at Love Field are impliedly preempted because Congress sought to "occup[y] the field" of regulation of interstate service at Love Field. Pet. App. 121-122. See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-634 (1973).

entity, of air carriers' routes and services. The relevant provisions of the use agreements "are essentially coextensive with the [1968 Bond] Ordinance," were designed to implement the service restrictions contained in the Ordinance, and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance." *Id.* at 45. Consequently, the court of appeals correctly held that the use agreements are preempted for the same reasons, and to the same extent, that the 1968 Bond Ordinance is preempted.[20]

Contrary to petitioners' assertions (FW Pet. 19-21; DFW Pet. 12-14), the court of appeals' decision does not conflict with this Court's decision in *Wolens* with respect to the reach of Section 41713(b). In *Wolens*, the Court held that Section 41713(b) "allows room for court enforcement of contract terms set by the parties themselves" in "suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 222, 228. There, the airlines themselves had imposed the contract obligations, which related to frequent-flyer programs for airline passengers. The Court concluded that Section 41713(b) did not preclude enforcement of those "privately ordered obligations." *Id.* at 228.

This case, in contrast to *Wolens*, concerns contract obligations that were imposed by a local government entity, not a private party, and that were designed to effectuate a local law, not private "business judgments." 513 U.S. at 229. The

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[20] Petitioner DFW Airport Board argues (Pet. 17-20) that, even if the 1968 Bond Ordinance is preempted, it does not follow that the use agreements are preempted, simply because those agreements refer to the Ordinance. But the use agreements do more than refer to the Ordinance. The purpose of the consent provision of the use agreements is to enforce a government policy by restricting airlines to the routes favored by the cities and the Board.

Wolens Court expressly distinguished such "state-imposed obligations" from the private obligations at issue in that case. *Id.* at 222, 228. Otherwise, a state or local government entity, such as the DFW Airport Board here, could readily circumvent Section 41713(b) by enforcing "price, route, or service" restrictions though contract, rather than through statute.[21]

Finally, although petitioner DFW Airport Board claims (Pet. 19) that the applicability of Section 41713(b) to use agreements between airport operators and individual airlines is "a far-reaching issue of nationwide importance," petitioners do not cite *any* decision of *any* court that addresses that issue.[22] The dearth of such decisions confirms that the issue is not, at least at this time, of sufficiently recurring significance to warrant this Court's review.

3. Petitioner Fort Worth contends (Pet. 22-26) that the Department of Transportation was required to give pre-

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[21] Petitioners note (FW Pet. 21; DFW Pet. 16) that this Court in *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218 (1993), drew a distinction, for purposes of implied preemption analysis under the National Labor Relations Act, between a State's acts in a regulatory capacity and a State's acts in a proprietary capacity. See also *Associated Gen. Contractors* v. *Metropolitan Water Dist.*, 159 F.3d 1178 (9th Cir. 1998) (case cited by petitioner DFW Airport Board drawing such a distinction with respect to express preemption analysis under ERISA). But such cases do not resolve the question whether the DFW Airport Board was engaging in regulation, as opposed to appropriate proprietary activity, in imposing a contract requirement that prevents signatory airlines from using Love Field without the Board's consent. Moreover, to the extent that the analysis of whether a state government's action is proprietary or regulatory is informed by whether private parties engage in such action, see *Building & Constr. Trades Council*, 507 U.S. at 228-229, private parties do not ordinarily dictate which airports an airline may use.

[22] We are informed by the Department of Transportation that very few other airports attempt to enter into use agreements that require an airline to obtain the airport's consent to use another airport in the area.

clusive effect to the state trial court's December 1998 judgment in *City of Fort Worth*, which held that the restrictions on Love Field service contained in the 1968 Bond Ordinance "are not preempted by federal law, and are valid and enforceable." Pet. App. 179. This issue may well be of no continuing significance. On May 25, 2000, the state court of appeals, which had stayed the appeal in *City of Fort Worth* pending the Fifth Circuit's decision in this case, reversed the trial court's judgment. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV, slip op. at 1-2, 30-31 (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).[23] In any event, contrary to petitioner Fort Worth's assertions, neither 28 U.S.C. 1738 nor federal common-law rules of preclusion required the Department of Transportation to defer to the state trial court's judgment.

Section 1738 provides, in pertinent part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken." Section 1738, by its terms, thus requires only that "court[s] within the United States," but not federal agencies, accord "full faith and credit" to the judgments of state courts. Consequently, the statute had no application to the Department of Transportation's administrative proceedings in this case. As the court of appeals noted (Pet. App. 17-18), the only other circuit that has fully considered the question reached the same conclusion. See *NLRB* v. *Yellow Freight Sys., Inc.*, 930 F.2d 316, 320 (3d Cir.) (Section 1738 did not require the NLRB to give preclusive effect to a state

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[23] The court of appeals concluded, *inter alia*, that "the restrictions on Love Field air passenger service contained in the [1968] Bond Ordinance are preempted by the [Airline Deregulation Act]." *Legend Airlines*, slip op. 30.

arbitrator's decision because the NLRB is an agency, not a court), cert. denied, 502 U.S. 820 (1991); cf. *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (Section 1738 governs only the preclusive effect to be given to judgments of state "courts," and thus does not apply to unreviewed state administrative decisions). The decision on which petitioner Fort Worth principally relies, *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs*, 125 F.3d 18 (1st Cir. 1997), is not to the contrary. In that case, the First Circuit recognized, in accordance with *Elliott*, that Section 1738 had no application to that case, which concerned the preclusive effect to be given to a state administrative decision. The court instead relied on non-statutory preclusion doctrines in determining the effect to be accorded that decision. See *id.* at 21.[24]

As for common-law preclusion, this Court has declined to hold that the federal government is precluded by a prior adjudication in circumstances where doing so could undermine important national interests. See *Heck* v. *Humphrey*, 512 U.S. 477, 488-489 n.9 (1994) (citing *United States* v. *Mendoza*, 464 U.S. 154 (1984)). Such interests are implicated where, as here, preclusion would constrain a federal agency

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[24] Petitioner Fort Worth's other claims of a circuit conflict are equally without merit. In *Town of Deerfield* v. *FCC*, 992 F.2d 420 (2d Cir. 1993), the court of appeals did not hold that the FCC was required, by Section 1738 or otherwise, to defer to a state court judgment; rather, the court held that the FCC was required to accord preclusive effect to an earlier federal court judgment. In *Midgett* v. *United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), the Court of Claims did not hold that the agency was required to give preclusive effect to a state court's decree of death; rather, the court stated that the agency should have considered the decree as prima facie evidence of death, suggesting that the decree was entitled to such treatment only because it was issued in a proceeding in rem. *Id.* at 846. The court ultimately held that the agency's decision was arbitrary and capricious, whether or not the state court decree was given full faith and credit. *Id.* at 846-849.

in interpreting statutes that Congress has charged the agency to administer. As the court of appeals observed (Pet. App. 21), this case "involves aviation regulation, an area where federal concerns are preeminent and where [the Department of Transportation] is charged with representing those concerns." More specifically, the case "involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated." *Ibid.* And the Department was not a party to the state court proceedings. In such circumstances, the Department was not required to defer to the determinations of a state trial court, with no expertise in, or responsibility for, aviation regulation, simply because the state court issued its (now reversed) decision one week before the Department issued its own decision.

4. Petitioner DFW Airport Board challenges (Pet. 20-29) the Department of Transportation's decision, affirmed by the court of appeals, that airlines may offer through service from Love Field to ultimate destinations outside the seven-state area, if the travel begins with a flight from Love Field to an intermediate Texas destination on a "commuter aircraft" (*i.e.*, one with a capacity of no more than 56 passengers). The court of appeals, after determining that Congress did not speak directly to this question, held that the Department reasonably interpreted the Wright and Shelby Amendments as allowing such service. Pet. App. 50. The court of appeals' application of the mode of analysis articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the particular facts and circumstances of this case does not warrant this Court's review.

Here, the Department of Transportation assumed, and no party disputed, that the Wright Amendment does not bar through service that commences with a flight on a commuter

aircraft between Love Field and a point outside Texas.[25] The only difference here is that the initial leg of the flight would be between Love Field and a point inside Texas. The Department concluded that Congress did not intend to treat Love Field flights on commuter aircraft differently, with respect to the availability of through service, depending on whether the flight ended inside or outside Texas. As the court of appeals held (Pet. App. 50-52), the Department's conclusion was reasonable and consistent with the Wright and Shelby Amendments.

The court of appeals' decision does not, as petitioner DFW Airport Board asserts (Pet. 24, 28), conflict with *Continental Air Lines* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1986). The two cases address different questions. In *Continental Air Lines*, the court of appeals affirmed the Department of Transportation's determination that the "through service" restriction in subsection (c) of the Wright Amendment did not prevent an airline from operating between Love Field and Houston, simply because the airline provided through service or ticketing with another carrier on its other flights. *Id.* at 1445-1154. The court also affirmed the Department's conclusion that subsection (a) of the Wright Amendment allows all airlines, not merely commuter airlines, to operate interstate flights from Love Field in aircraft with a capacity of no more than 56 passengers. *Id.* at 1454-1455. Neither issue is raised in this case.[26]

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[25] As the court of appeals explained (Pet. App. 50-52), subsection (a) of the Wright Amendment, which allows interstate service from Love Field on commuter aircraft, contains no restriction on through service; subsection (c), which does contain a prohibition on through service, does not apply to commuter aircraft, but only to "large jets" (*i.e.*, aircraft with a capacity of more than 56 passengers).

[26] Petitioner DFW Airport Board also notes (Pet. 21-22) that another portion of the Department of Transportation's order that was reviewed in *Continental Air Lines* concluded that an airline could not provide flights

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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from Love Field, with an intermediate stop in Houston, to points outside the four contiguous States identified in the Wright Amendment. See Order No. 85-12-81, 1985 WL 57886, at *10-11 (Dec. 31, 1985). The Department's earlier ruling, which was concerned only with whether such service could be provided on large jets (*i.e.*, aircraft with a capacity of more than 56 passengers), construed subsection (c) of the Wright Amendment. The ruling in this case, which was concerned with whether such service could be provided on commuter aircraft, construed subsection (a) of the Wright Amendment. There is no inconsistency between the two agency rulings.